

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL KIM,

Plaintiff and Appellant,

v.

JOYCE KIM, individually and as Trustee,
etc.,

Defendant and Respondent.

E047675

(Super.Ct.No. SPRSS06559)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Joseph DiGiulio and Howard Posner for Plaintiff and Appellant.

Robert L. Kern and Russell A. Dalton, Jr., for Defendant and Respondent.

In 2003, Lorie Valera Kim signed the The Lorie Valera Kim Trust (the Trust) dividing her estate among her three children, Joyce Kim, Michael Kim, and Jeannette Kim. The Trust had a no contest clause, which barred any recovery for a party who contested the Trust. In 2004, Lorie executed an amendment to the Trust (the

Amendment) leaving all of the real property and most of the other assets of the estate to Joyce and giving only \$10,000 each to Jeannette and Michael.

Michael filed a petition contesting the Amendment and the Trust, contending they were the result of undue influence and fraud by Joyce on Lorie. After a court trial, the trial court concluded in a statement of decision (Decision) that the Amendment and the Trust were executed based on Lorie's free will, not due to Joyce's undue influence. The record contains conflicting orders on the application of the no contest clause.

Michael appeals the finding of the trial court that the Amendment was not the subject of undue influence by Joyce. Michael also contends that, if we uphold the ruling of the trial court, he is entitled to \$10,000 under the Amendment because it did not have a no contest clause, the exception of Probate Code section 21307 applies, and the no contest clause in the Trust was not applicable to the Amendment.

We conclude the trial court did not abuse its discretion by finding that the Amendment was not a result of undue influence. We also find Michael has an enforceable judgment against the estate for the \$10,000 under the Amendment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Michael's Evidence in Support of Presumption of Undue Influence*

1. *Lorie's background and illness*

Lorie received medical training in the Philippines and came to the United States in 1978 or 1979. She worked as a laboratory scientist. She had three children with her ex-

husband: Michael, Joyce, and Jeannette. She was able to save money and buy several properties in Loma Linda.

In June 1994, Lorie was diagnosed with ovarian cancer. She had surgery in September 1994. She had a stroke in 2000. Her cancer went into remission but reappeared in 2002 and 2004. In late 2003, she had a tracheotomy and could no longer speak.

Lorie was at several different board and care facilities, private homes, and hospitals from 2002 until her death. Joyce informed Jeannette about the moves, and she was in contact with the family. Lorie could not speak after the tracheotomy but had a communication board at the hospital that she used. Lorie died in February 2005.

2. Lorie's children and their relationship with Lorie

Michael had lived 100 miles from Lorie's home for about 10 years prior to her death. He was a registered nurse. When Michael and Lorie first came to America in 1978 and 1979, they lived together, and Michael helped out financially. He had no money during this time because he gave it all to Lorie. He supported Joyce, too, when she came in 1986 and accused Joyce of treating him like a servant. While living together, Michael observed Joyce practice forging Lorie's signature.

Michael visited Lorie at the hospital after her first surgery in 1994. He visited her after her stroke in 2000. After this, Michael was afraid to visit because of William Barrett, Lorie's long-time boyfriend. Michael also tried to avoid Joyce. He visited Lorie only about five times between 2000 and 2002. In 2002, after the second ovarian cancer

surgery, he got family leave for several weeks at Lorie's request. He visited her often in the board and care facility.

During this time, Michael was asked by Lorie to write down the bad things Joyce had done to her. She dictated it to Michael. According to these notes, Lorie told Michael that Joyce had called the police on several occasions about Lorie failing to take her psychiatric medication. Lorie also complained that Joyce was trying to keep her away from Barrett.

Michael did not know that Lorie had had a tracheotomy until about two weeks prior to her death. Joyce had asked Michael to help take care of Lorie in 2000, after Lorie's stroke, but he had refused.

Joyce last worked as a registered nurse in 2002. She put her life "on hold" so that she could take care of Lorie. No one in the family ever complained about Joyce's care of Lorie. Jeannette was a doctor.

3. *Lorie's sisters*

Helen Lewellyn and Erlinda Cabrillas were Lorie's sisters. Lorie told Helen in 1994 that she wanted to divide her property equally between all three children.

Lorie told Helen that in late 2002 Joyce had taken her to an attorney after a hospitalization and made her create a trust. Lorie told Helen and Erlinda that Joyce had pressured her to sign the Trust by threatening that, if she did not, Joyce would not take

care of her.¹ Lorie did not want to sign the Trust because it did not reflect how she wanted the property divided. Helen presented a notation on a calendar as corroboration of this discussion.² Lorie wanted Joyce to stay with her even when Helen offered that she and Erlinda could take care of her. Helen indicated that she spoke with Lorie often after she became sick and that Lorie complained a lot about her care at the board and care facilities.

A few months after this, Helen and Erlinda tried to take Lorie food on two separate occasions. Joyce denied them access even though they could hear Lorie in the house screaming to let them in. Erlinda attempted to visit Lorie at the hospital, but Joyce had changed Lorie's name so Erlinda could not find her. In 2003, Joyce indicated that Helen and Erlinda had told Lorie to sell her properties to pay for her care instead of using Medicare. Helen and Erlinda had suggested this in order for her to get better care. Lorie told Helen that Joyce would not let her. Joyce then yelled at Erlinda and Helen for telling her to sell the property and demanded they leave. Lorie never complained about Barrett threatening her or being violent with her to Helen and Erlinda. All three children complained about Barrett to Helen.

¹ Erlinda stated that Lorie was upset because of the division of the Trust, which she said was 70 percent to Joyce, 20 percent to Jeannette, and 10 percent to Michael.

² Joyce complains that the notation on the calendar was clearly different from the remaining notations. However, the clerk's transcript does not contain the exhibit, and Joyce has failed to have the exhibit transferred to this court for our examination.

Both sisters claimed they did not visit Lorie after her tracheotomy because they did not know where she was located most of the time, and Joyce would not let them. Lorie could not call them.³ Helen and Erlinda saw Lorie just before she passed away. Joyce stopped taking Lorie to the family gatherings, because Joyce claimed to have been sexually assaulted by a cousin.

Helen and Erlinda claimed to offer to help with Lorie's care, but Joyce refused. Helen admitted she had previously stated that Lorie loved Joyce the best of the children. Helen described Lorie as persistent and strong willed when she was not sick.

4. *William Barrett*

Barrett was Lorie's boyfriend; they had known each other for at least 20 years. Barrett was an alcoholic.

In 2001, Joyce sought and obtained a court order restraining Barrett from her because she claimed he broke her wrist. Joyce did not want Barrett around Lorie. A transcript from the hearing on the restraining order was introduced wherein Lorie stated to the court Joyce was trying to take over her property and wanted to get rid of Barrett. Lorie complained to Helen about the restraining order because it meant that Barrett could not be around Lorie, either.

In 2002, upon release from the hospital, Lorie lived in various board and care facilities at least partly out of fear of Barrett.

³ At a prior proceeding, Helen indicated they visited Lorie twice after the tracheotomy.

Michael corroborated that Barrett had been violent. He claimed Barrett had hit him in the face, resulting in a cut lip. He was so afraid of Barrett that he wore a bullet proof vest on a visit to Lorie's house. Michael had testified previously that Barrett had attempted to molest Joyce and Jeannette.

Barrett also apparently threatened a city housing inspector; according to Michael, he was bailed out by Lorie despite Joyce's efforts to keep her from finding Barrett in jail. Around the time Joyce got the restraining order, Lorie tried to leave the house to go to Barrett's in a wheelchair but was stopped by Joyce. Lorie left one time to stay with Barrett for three days without telling Joyce.

Barrett lived on Lorie's property until he died sometime before December 2005. Joyce and Lorie had discussed that Lorie no longer wanted Barrett living in one of the rental units.

5. *The Trust and the Amendment*

Lorie retained Scot Stirling and Ronald Ask as lawyers to prepare the Trust. Joyce admitted that she drove Lorie to their office prior to the Trust being signed. Joyce admitted being present while Lorie spoke with them regarding the distribution of her estate but also left during some discussions. Joyce was present when the Trust was signed while Lorie was in the hospital and signed some of the pages herself. Lorie had summoned the attorneys to the hospital for her to sign the Trust. The Trust was signed on January 10, 2003.

In April 2004, Joyce overheard a conversation between Lorie and Remedios Abaro, Lorie's nurse. They were discussing that Lorie wanted Joyce to have all of Lorie's properties. Abaro relayed to Joyce that she and Lorie had previously had a conversation during which Lorie had told her she wanted to change her trust to give everything to Joyce. Based on this, at the direction of Lorie, Joyce contacted Stirling and his paralegal Darryl LaChance. Joyce and Lorie had discussions about the distribution. Joyce admitted that she told Stirling and LaChance what Lorie wanted because Lorie could not speak. Joyce was present when the Amendment was discussed. LaChance met with Lorie two times, and Stirling met with her once.

Michael had no knowledge of the Trust or the Amendment until Lorie's death. The value of Lorie's estate was estimated at \$1,700,000.

B. *Joyce's Rebuttal Evidence*

Ask recalled Lorie being in his office to discuss the Trust. Ask's practice was to ask any family member accompanying the person making the trust to step out of the office while the terms of the trust were discussed. Ask went to the hospital where Lorie was at the time and had her properly execute the Trust. Ask believed that Lorie was acting on her own free will regarding the Trust.

LaChance worked for Ask and Ask's partner, Scot Stirling. At the time of trial, Stirling was no longer a practicing attorney; he was a real estate broker. He operated the

firm with Ronald Ask. They both had problems with the State Bar. Stirling was on “involuntarily inactive status,” and Ask had been suspended.⁴

LaChance assisted with the preparation of the Trust. According to LaChance, Lorie was well aware of her assets.

Stirling was contacted by Joyce to prepare an amendment to the Trust. Stirling sent LaChance to meet with Lorie sometime in March or April 2004. LaChance met with her several times to go over the details of the Amendment. Joyce was normally not present. Lorie had no trouble understanding him and knew what she wanted to do in amending the Trust. Stirling prepared the Amendment in May 2004.

The wording of the Amendment was as follows: “This distribution is in return for the many years of self-sacrifice provided by my daughter JOYCE KIM. JOYCE has helped me all of her life, as a loving and dutiful daughter and has helped me to purchase, maintain and manage my rental properties. She has given her time, effort and money to take care of my real properties and also taken care of my personal health to see me through my illnesses and rehabilitate me. She has even put aside her career and personal life to ensure that she could personally provide the best healthcare possible.” The

⁴ Ask testified that he had been suspended by the State Bar due to mismanagement in his and Stirling’s office. The suspension had nothing to do with the instant case. In his reply brief, Michael contends for the first time that Stirling was in fact disbarred. Joyce filed a motion to strike this new “fact” or, in the alternative, to consider additional facts on November 12, 2009. On December 4, 2009, we reserved our ruling on the matter. Stirling’s trouble with the State Bar was not a salient fact in the trial court’s decision. Since the issue that Stirling was disbarred was not before the trial court, we do not consider it on appeal.

Amendment also revoked the right of occupancy for Barrett “due to the deception, threats and harassment he has done to myself and my daughter Joyce Kim.”

At the time the Amendment was prepared, LaChance observed that Lorie was well cared for in her home environment. He did not observe that Joyce had any influence over her. Stirling read the completed Amendment to Lorie without Joyce. Lorie was able to respond to Stirling by nodding or shaking her head. Stirling had no doubt that the Amendment reflected Lorie’s wishes that Joyce receive all of her property because Joyce had taken care of Lorie. Stirling left the Amendment with Joyce and Lorie to sign before a Notary Public and two witnesses.

There was a delay in signing the Amendment because competency evaluations had to be conducted. Dr. Richard Rappaport, a psychiatrist, examined Lorie in September 2004 at Stirling’s request. He met with Joyce first to obtain some family background information. Dr. Rappaport could communicate with Lorie because she could move her head and her left hand. Lorie understood she owned six properties and wanted to give them all to Joyce. Lorie wanted no property to go to Michael or Jeannette.

Dr. Rappaport concluded that Lorie was competent to make decisions about her health and property. Lorie was being taken well care of and did not show any fear of Joyce.

Notary Public Cheri Wickam was asked by Joyce to notarize the Amendment. There were three witnesses present when Lorie signed the Amendment. Lorie was able to respond and wanted to sign the Amendment after it was read to her.

Alice Trumbell was present when the Amendment was signed. The Amendment was read to Lorie, and then she signed it. Lorie appeared to listen carefully to the wording in the Amendment.

William McGowan was a licensed social worker who worked at Kaiser Hospital in Fontana. He saw Lorie and Joyce several times in the hospital when Lorie's tracheotomy tube was installed. He was never concerned for Lorie and did not see Joyce be inappropriate with her. Joyce had asked McGowan to contact Michael. McGowan had left messages at Michael's work but never heard from him. McGowan often spoke with Lorie, and she understood her illness. He described her as a "very strong lady."

C. Filing of Petition

On July 13, 2005, Michael filed the petition to void and invalidate the Trust and the Amendment (the Petition). Attached to the Petition was a copy of the Trust executed on January 10, 2003. In addition, the Amendment executed on September 28, 2004, was included. Michael alleged that the Trust and the Amendment should be invalidated on the ground of undue influence by Joyce and for fraud. Joyce filed an objection to the Petition.

Joyce filed a petition to terminate Michael's interest in the estate under the no contest provision in the Trust (the Petition to Terminate Beneficiary's Interest) alleging that under the no contest clause of the Trust, Michael was not entitled to collect his \$10,000 inheritance. Michael filed an objection, relying on Probate Code section 21307 to contest the Trust and also that the Amendment did not contain a no contest clause.

A court trial began on October 6, 2008. It issued a decision finding that the Trust and the Amendment had withstood the challenge posed by the presumption of undue influence and were valid. There was no ruling on Joyce's Petition to Terminate Beneficiary's Interest. No objections to the Decision were filed, even though the parties were advised that such objections could be filed.

Joyce filed a judgment that provided that the trial court had denied the Petition and had granted Joyce's Petition to Terminate Beneficiary's Interest. Michael filed an objection to the proposed judgment filed by Joyce, contending the matter regarding the Petition to Terminate Beneficiary's Interest was not tried before the court, and the trial court did not make any findings on it. The trial court signed the judgment, amending it by interlineation to state that the Petition to Terminate Beneficiary's Interest was "deemed moot."⁵

II

VALIDITY OF TRUST AND AMENDMENT

Michael contends that the trial court erred in reaching its decision that the Trust and the Amendment were valid and not as a result of undue influence by Joyce.

"As a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the dispositions specified are appropriate

⁵ Joyce filed a notice of entry of judgment on December 9, 2008, with a conformed copy of the judgment attached. That conformed copy does not include the interlineated language apparently added by the court to the original judgment. Neither party has attempted to explain the discrepancy.

or fair. [Citations.] Testamentary competence is presumed. [Citations.]” (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604, superseded by statute on other grounds as stated in *Rice v. Clark* (2002) 28 Cal.4th 89.) ““Undue influence . . . is the legal condemnation of a situation in which extraordinary and abnormal pressure subverts independent free will and diverts it from its natural course in accordance with the dictates of another person.’ [Citations.]” (*Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1059.)

A presumption of undue influence arises upon a showing that “(1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument’s preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.” (*Rice v. Clark, supra*, 28 Cal.4th at p. 97.)

Where such a presumption arises, the burden shifts to the person profiting under the will to show that the will is not the product of undue influence. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 483.) “While the person challenging the testamentary instrument ordinarily has the burden of proving undue influence, ‘under certain narrow circumstances, a presumption of undue influence may arise, shifting to the proponent of the disposition the burden of proving by a preponderance of the evidence that the donative instrument was *not* procured by undue influence.’ [Citation.]” (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) ““Undue influence,’ obviously, is not something that can be seen, heard, smelt or felt; its presence can only be established by

proof of circumstances from which it may be deduced.” (*Estate of Farris* (1960) 185 Cal.App.2d 731, 734.)

Whether the presumption applies and, if so, whether it has been rebutted are factual issues to be resolved by the trial court and are thus subject on review to the substantial evidence standard. (*David v. Hermann, supra*, 129 Cal.App.4th at pp. 684-685.)

“When determining whether there is sufficient evidence to support the trial court’s finding of undue benefit, we follow established rules of appellate review: We view factual matters most favorably to the prevailing party and in support of the judgment. We defer issues of credibility to the trier of fact. Additionally, we resolve all conflicts in the evidence in favor of the respondents. [Citation.] Our power ‘begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion’ reached by the trier of fact. [Citation.]” (*Estate of Auen* (1994) 30 Cal.App.4th 300, 311, superseded by statute on other grounds as stated in *Rice v. Clark, supra*, 28 Cal.4th 89.)

Michael recognizes that the trial court found that a prima facie case of undue influence had been made. However, he complains that the trial court misapplied the burden of proof in finding that Joyce had rebutted the presumption in this case. He claims the trial court “looked for evidence that called into question the facts giving rise to the presumption in the first place, and wrote a statement of decision which appears to say that the same elements of the care are both proved and disproved by a preponderance of

the evidence.” However, a closer look at his argument shows that he is really raising a claim that there was no substantial evidence to support the trial court’s decision to find Lorie freely and voluntarily made the Trust and the Amendment.

In the Decision, the trial court noted that Petitioner has two burdens: “the burden of going forward and the burden of proof.” The trial court also stated that the proponent of the document (the Trust and the Amendment) must overcome the evidence creating the presumption by a preponderance of the evidence. The trial court stated it would look at evidence of both the Trust and the Amendment that Michael presented for prima facie evidence. It would then consider Joyce’s rebuttal evidence.

The trial court found that Michael had presented a prima facie case-in-chief that the presumption of undue influence by Joyce over Lorie had been proven as to both the Trust⁶ and the Amendment. It concluded Michael had made a prima facie showing that Joyce was in a confidential relationship with Lorie as her business manager and caregiver. It addressed the procurement-of-the-instrument condition and concluded there was a prima facie case of this, as Joyce had obtained the lawyers to do the Trust and the Amendment. In addressing the undue-profit condition, the trial court noted that all three children received two properties, but it presumed that Lorie’s sisters’ testimony was true that Lorie told them Joyce threatened her if she did not give Joyce properties. As for the Amendment, undue profit was shown as Joyce received almost 100 percent of the estate.

⁶ Michael has apparently abandoned his argument on appeal that the Trust was the result of undue influence.

The trial court then looked to Joyce's evidence to determine if the presumption had been rebutted. The trial court found that Joyce had not rebutted the presumption of a confidential relationship.

The trial court rejected that Joyce had procured the Trust. It believed Ask's testimony was credible that he had Joyce leave the office and worked with Lorie to create the Trust according to her wishes and that the delay in the Amendment being actually signed and the numerous other parties involved in getting it executed "virtually eliminates any argument of manipulated procedures." The trial court concluded, ". . . Joyce's evidence preponderates over that of the Petitioner Michael regarding the Trust and the Amendment to the Trust, respecting 'procuring the instrument.'"

It then reviewed the evidence presented as to whether Joyce unduly profited from the Trust and the Amendment, including that Joyce had provided 24-hour care for the final years of Lorie's life. It also reviewed evidence that Michael had had little or no involvement in Lorie's life. The trial court concluded, "As to the third leg of the presumption, for both the Trust and the Amendment to the Trust, the evidence furnished by Respondent Joyce preponderates greatly over that of Petitioner Michael Kim."

Initially, if Michael felt that the trial court applied the wrong standard of review, it was incumbent upon him to object to the Decision and point out such alleged deficiencies in the trial court. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132-1134, 1138.) Furthermore, we do not interpret the Decision as he does to show the trial court applied the incorrect burden of proof. The trial court clearly found that Michael had

made a prima facie case of undue influence and shifted the burden of proof to Joyce.

When the Decision is read as a whole, it becomes apparent that the trial court did require Joyce to produce evidence to overcome the presumption. Joyce only had to do this by a preponderance of the evidence. (*Estate of Stephens* (2002) 28 Cal.4th 665, 677.)

We determine there was substantial evidence presented at the court trial to support the conclusion that Lorie executed the Amendment upon her own free will and not as a result of undue influence by Joyce. The trial court's Decision shows it carefully and thoroughly considered the issue, and ample evidence in the record supports the trial court's conclusion.

In assessing whether there was undue influence, the trial court found that Lorie was ““strong-willed.”” The evidence supported this conclusion. She had raised three children, been able to buy real estate properties, and suffered through years of medical procedures. Even when she became ill, Lorie clearly spoke her mind when she wanted something. At the restraining order hearing, it was clear that she wanted to be with Barrett, regardless of how he treated her and Joyce. It appeared she would go to great lengths to be with him. This is evidenced by her trying to leave the house in a wheelchair to see him.

The trial court recognized the impact that Barrett could have on whether Lorie had resolve if she was willing to put up with his abuse. It viewed it as a show of her “conscious decision on her part to satisfy her own selfish desires[.]”

Michael agreed that Barrett was a violent man and said he himself was afraid of Barrett. He recognized that Barrett was abusive to Joyce. Despite this, Lorie continued her relationship with Barrett. She clearly wanted to be with Barrett regardless of the impact on her family, which supports the trial court's finding of her decision to "satisfy her selfish desires[.]"

In reaching its decision, the trial court disregarded that the sisters were unable to visit Lorie. It felt that if they were so concerned about Lorie's well-being, they should have spoken with someone at the rest homes or hospitals about Joyce's influence. Despite their claim that Lorie told them Joyce was threatening not to take care of her unless she signed the Trust, she also told them that she wanted Joyce to take care of her. The trial court was offended by the sisters' attack on Joyce's character. Further, the trial court found any reluctance to visit Lorie by Michael because of Barrett was not warranted, as Barrett was not in Lorie's life at the end.

It is clear that the trial court felt, based on the evidence presented in rebuttal by Joyce, that Michael's and the sisters' testimonies were not credible, and even if they were, they did not show undue influence on Lorie to make the Trust and the Amendment. We defer to the trial court's considered determinations of the credibility and weight to be given to the testimony of the witnesses. (See *Estate of Auen*, *supra*, 30 Cal.App.4th at p. 311; *Estate of Baker*, *supra*, 131 Cal.App.3d at p. 483.)

It was clear that Michael did nothing during the last two years of Lorie's life to attempt to visit her. Since he had not seen Lorie or Joyce around the time the Trust and

the Amendment were executed, he had no knowledge of any possible influence by Joyce. Based on other evidence from Stirling, Dr. Rappaport, and LaChance, the Amendment reflected Lorie's interest in seeing that Joyce, who was her sole caregiver for essentially the last two years of her life and gave up her own career, receive the majority of her estate. We conclude the trial court's Decision is supported by ample evidence.

III

NO CONTEST CLAUSE

Michael contends that, if this court upholds the trial court's ruling on the Petition, he is entitled to the \$10,000 distribution under the Amendment. He and Joyce assume that he was denied such amount by the trial court's order.

A. Additional Factual Background

After Michael filed the Petition, Joyce brought the Petition to Terminate Beneficiary's Interest based on the no contest clause in the Trust. The no contest clause provided, "In the event that any beneficiary under this trust shall, singly or in conjunction with any other person or persons, contest in any court the validity of his trust or the Trustor's Last Will or shall seek to obtain an adjudication in any proceeding in any court that this trust or any of its provisions, or that such Will or any of its provisions, is void, or seek otherwise to void, nullify, or set aside the this trust or any of its provisions, then the right of that person to taken any interest given to him by this trust shall be determined as it would have been determined had the person predeceased the execution of this Trust

Agreement. The Trustee is authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions.”

At the time Michael closed his evidence, Joyce argued that if the trial court were to find that the Trust was valid, it should enforce the no contest clause, and the matter should be closed; there would be no need to decide the validity of the Amendment. Michael argued that the no contest clause was not applicable because of Probate Code section 21307.⁷ The trial court noted there was a question as to whether the Amendment incorporated the terms of the Trust, but it did not resolve the issue. Joyce presented no evidence on the no contest clause at the court trial.

During closing argument, Joyce again argued that if the trial court found the Trust to be valid, that it should invoke the no contest clause, terminating Michael’s interest. Michael argued that there were exceptions to the no contest clause. The trial court’s Decision did not address the issue.

Joyce filed a notice of entry of judgment on December 9, 2008, attaching a conformed copy of the judgment dated December 4, 2008. That conformed copy reflects

⁷ Probate Code section 21307 provides as follows: “A no contest clause is not enforceable against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits any of the following persons: [¶] (a) A person who drafted or transcribed the instrument. [¶] A person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument, but this subdivision does not apply if the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause. [¶] (c) A person who acted as a witness to the instrument.”

that the Petition for Termination of Beneficiary's Interest was granted. As set forth, *ante*, the original shows the trial court ruled it moot by interlineation. Michael notes the discrepancy, contending he did not know about the signed judgment until several days prior to filing his opening brief.

B. *Analysis*

Joyce brought the Petition to Terminate Beneficiary's Interest but failed to litigate it; she failed to pursue the motion at trial during her rebuttal case and never sought a ruling from the court. There were numerous contested issues to be decided by the court. She never objected to the Decision, which did not address her petition. It was incumbent upon her to object to the Decision by pointing out any alleged deficiency to the trial court. (*In re Marriage of Arceneaux, supra*, 51 Cal.3d at pp. 1132-1134, 1138.)

Although not entirely clear from the record before us, it does appear the trial court considered the Petition to Terminate Beneficiary's Interest to be moot. Joyce fails to address the trial court's competing order that it was moot. Joyce faults Michael for not offering any fact that he established probable cause under Probate Code section 21307 to contest the Amendment and the Trust or raising the issue at trial. However, it was Joyce's burden to prove the no contest clause applied as it was her petition. We can reasonably infer that the trial court made a mootness finding based on Joyce's failure to litigate the issue.

Since no evidence was presented at trial, and the trial court did not make a ruling in its Decision, the trial court properly found the Petition to Terminate Beneficiary's

Interest moot. As such, there was no finding by the trial court that Michael was foreclosed by the Amendment in collecting the \$10,000 he was awarded. Hence, Michael has an enforceable judgment against the estate for the \$10,000.

IV

DISPOSITION

We affirm the trial court's ruling. Michael has an enforceable judgment against the estate for the \$10,000 under the terms of the Amendment to the Lorie Valera Kim Trust. Joyce shall recover her costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

MILLER
J.